

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
ASHEVILLE DIVISION  
Criminal Case No. 1:09-cr-00052-MR-1**

**THIS MATTER** comes before the Court on the Defendant's "Motion for Reduction of Sentence" [Doc. 78].

On October 30, 2009, the Defendant pleaded guilty pursuant to a written plea agreement to three counts of possession of a firearm or ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and one count of possession of an unregistered shotgun with a barrel that was less than 18 inches. The Defendant was sentenced on July 9, 2010 to 108 months' imprisonment. [Doc. 35]. The Fourth Circuit Court of Appeals affirmed his conviction and sentence. United States v. Banks, 442 F. App'x 759 (4<sup>th</sup> Cir. 2011).

On July 2, 2012, the Defendant filed a motion to vacate pursuant to 28 U.S.C. § 2255. [Doc. 1]. On January 6, 2014, the Court denied the

Defendant's motion to vacate, as amended, as well as several other motions that the Defendant filed while his § 2255 motion was pending. [Doc. 65]. On July 9, 2014, the Fourth Circuit dismissed the Defendant's appeal and denied a certificate of appealability. United States v. Banks, \_\_ F. App'x \_\_, 2014 WL 3338929 (4<sup>th</sup> Cir. July 9, 2014). In August 2014, the Defendant filed a motion seeking a reduction in his sentence based upon a "clerical error" in the calculation of his criminal history points and, consequently, his Guidelines range. [Doc. 70]. That motion was also denied [Doc. 71], and the Fourth Circuit Court of Appeals affirmed this dismissal and denied a certificate of appealability. [Doc. 76].

The Defendant now returns to this Court, seeking "a reduction of sentence, pursuant to 18 USC 3582(b); 18 USC 3742(a)(2)(3); 18 USC 3553(a), and in light of the Fourth Circuits ruling in 2011, known as 'Simmons v U.S. 649' and 'Miller v US in 2013 making Simmons retroactive.'" [Doc. 78 at 1]. In essence, the Defendant contends that he was sentenced "with the wrong Criminal History points." [Id.].

By the present motion, the Defendant appears to seek a reduction of his sentence pursuant to 18 U.S.C. § 3582. The Court may reduce or modify a sentence under § 3582 only in certain limited circumstances, however, none of which are applicable here. See 18 U.S.C. § 3582(c). Accordingly,

the Defendant's motion for a reduction of sentence pursuant to § 3582 is denied.

Further, although styled as a motion for reduction of sentence, the Defendant is essentially attacking the same criminal judgment that he challenged in his § 2255 motion. See United States v. Winestock, 340 F.3d 200, 207 (4<sup>th</sup> Cir. 2003) (noting that "new legal arguments or proffers of additional evidence will usually signify that the prisoner is . . . continuing his collateral attack on his conviction or sentence"). The Antiterrorism and Effective Death Penalty Act (AEDPA) provides, in relevant part, that "[a] second or successive motion [under Section 2255] must be certified as provided in Section 2244 by a panel of the appropriate court of appeals to contain —

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). As noted, the Defendant previously filed a motion to vacate pursuant to 28 U.S.C. § 2255, which was denied. The Defendant has provided no evidence that he has secured the necessary authorization from

the Fourth Circuit to proceed with a successive § 2255 motion. This Court is therefore without jurisdiction to consider a successive petition under § 2255.

See *In re Vial*, 115 F.3d 1192, 1194-95 (4<sup>th</sup> Cir. 1997) (en banc).

For the foregoing reasons, the Defendant's motion for reduction of sentence is denied. Further, pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, the Court declines to issue a certificate of appealability as the Defendant has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 474, 484 (2000) (holding that when relief is denied on procedural grounds, a petitioner must establish both that the correctness of the dispositive procedural ruling is debatable, and that the petition states a debatably valid claim of the denial of a constitutional right).

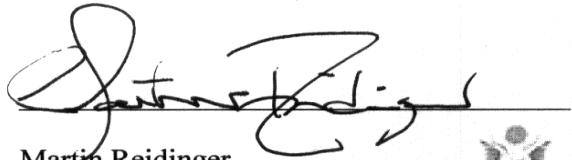
## ORDER

**IT IS, THEREFORE, ORDERED** that the Defendant's "Motion for Reduction of Sentence" [Doc. 78] is **DENIED**.

**IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, the Court declines to issue a certificate of appealability.

**IT IS SO ORDERED.**

Signed: February 8, 2016



Martin Reidinger  
United States District Judge

